**IN THE SUPREME COURT OF THE STATE OF MONTANA**

**APPEAL NO. 04-167**

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EUGENE FORD

Petitioner/Appellant

v.

STATE OF MONTANA

Respondent/Respondent

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# APPELLANT'S BRIEF ON APPEAL

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*Attorneys for Appellant:*
Antonia P. Marra
BELL & MARRA, pllc
Suite 303, Liberty Center
#9 Third Street North
Great Falls, MT 59401
Telephone (406) 727-5101

*Attorney for Respondent:*
Attorney General's Office
State of Montana
215 North Sanders
Helena, MT 59604

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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in denying Eugene Ford relief on his Petition for Post Conviction Relief claim of ineffective assistance of counsel.

## STATEMENT OF THE CASE

This is a criminal case wherein Eugene Ford was found guilty of deliberate homicide after trial by jury. A direct appeal was filed and this Court sustained the verdict and sentence in *State v. Ford*, 2001 MT 230, 306 Mont. 917, 39 P.3d 108. Ford then requested post conviction relief pursuant to §46-21-104, MCA and was appointed the same attorney as on his direct appeal. Ford's appointed attorney filed a petition on his behalf, asked to withdraw and filed an "Anders" brief. *California v. Anders*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.E.2d 493 (1967). (Appendix, Exhibit B, *Petition for Postconviction Relief,* dated 10/3/03; Exhibit D, *"Anders" Memorandum in Support of Petition for Postconviction Relief*, dated 10/9/03)

Ford then filed a *pro se* document with the district court providing information not provided by his counsel and requesting new counsel as documents and affidavits were not provided as he had requested through his counsel. (Appendix, Exhibit C, *Motion for Judicial Notice and Appointment of Counsel,* dated 11/19/03) The district court denied all relief sought, as well as

the appointment of a new attorney. (Appendix, Exhibit A *Order: Petition for Post Conviction Relief* dated 11/5/03; *Order*, dated 1/ 29/04) Mr. Ford then requested reconsideration of the district court's orders, which was denied. No hearing was ever held. Ford appealed from those rulings to this Court.

After filing his notice of appeal, Ford requested that this Court provide new counsel to pursue this appeal and new counsel was appointed. (Appendix, Exhibit E, *Response to Counsel's Motion to Withdraw,* dated 4/21/04) Ford has provided sufficient factual and legal basis for an evidentiary hearing to be conducted by the district court into the question of whether his counsel, both at the trial court and the direct appeal level provided ineffective assistance of counsel under the *Strickland v. Washington* (1984) 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 standard.

## STATEMENT OF FACTS

Eugene Ford was charged, by way of Information, with Deliberate Homicide alleged to be committed on March 12, 1999. (Trans. P. 5, ll. 23-25; P. 6, ll. 1-5) Ford was originally represented by Cascade County Public Defender Eric Olson. (Trans. P. 8) Prior to trial, Carl Jensen of the Cascade County Public Defender's Office took over the case and Mr. Jensen represented him at trial. (Trans. P. 17) Mr. Ford was convicted of deliberate homicide on

November 12, 1999. (Trans. P. 708, ll. 13-14)

The underlying facts which were on the record during trial were discussed in the opinion on direct appeal, *Ford, supra.* (Appendix, Exhibit B, Exhibit A therein) Ford was charged with the homicide of Michael Paul, his friend and roommate. Prior to trial, Ford requested his appointed attorney to do several things, including interview witnesses, move the court to suppress statements made under duress and in violation of *Miranda v. Arizona,* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694, move the court to suppress evidence gathered prior to a search warrant, and gather medical evidence prior to trial. (Appendix, Exhibit B, Exhibit G therein, Affidavit of Eugene Ford; *also see* Exhibit D, Article One through Five to *Response to Counsel's Motion to Withdraw* filed 4/22/04, this Court's file) The omnibus order notes that several pre-trial motions were to be filed. (Appendix, Exhibit B, Exhibit H therein) The motions were not filed.

Mr. Ford had also complained to all of his attorneys about how the first public defender had handled the media. In essence, this complaint was that the attorney called the local newspaper and complained about the local county jail allowing the decedent's sister to visit Mr. Ford in jail prior to trial. (Appendix, Exhibit B, Exhibit L therein) Mr. Ford was concerned that this pre-trial

publicity, which was negative about him and his case, prejudiced the jury pool. No motion to change venue was made by the defense after this publicity occurred and there was no request to the district court to allow for any expert in an attempt to determine if a change of venue would be a reasonable request.

At trial, defense counsel objected to the State's use of peremptory challenges to strike six women from the panel. The objection was overruled and the motion to allow a new jury pool was denied. (Trans. P. 210, ll. 3-11; 211, 23-25)

As counsel had not moved to suppress statements made by the defendant, those statements came in and were generally not disputed. As there was no motion to suppress evidence, the fact that a search warrant was issued after the search did not come into evidence before the jury.

During trial, defense counsel did not offer any evidence regarding what harm the officers and ambulance attendants at the scene caused the deceased, Michael Paul, in their emergency handling of him. According to testimony, which is somewhat confusing, Michael Paul was moved, seemingly several times in the bedroom after police, firemen and ambulance attendants arrived. Paul was given CPR with half of his dentures stuck down in his throat, but no expert evidence was presented as to whether this either led to or contributed to his

death. (Trans. P. 251, ll. 21-25; 252, ll. 1-3; 317, ll.13-19; 335, ll. 12-25; 337; 339, ll. 7-25; 401, ll. 14-17; 403, ll. 13-22; 406, ll. 12-17; 416, ll. 14-25; 417, ll. 1-21; 423, ll. 12-25; 424, ll. 1-10; 442, ll. 1-25; 448, ll. 1-22; 480, ll. 16-25; 481, ll. 10-25; 482; 483, ll. 9; 509, ll. 8-22; Appendix, Exhibit B, Exhibits D, E therein)

Cause of death was "asphyxia" "due to blunt force injuries of the neck and the head." (Trans. P. 546, ll. 9-13) The forensic pathologist who testified for the State agreed that "[T]he dentures, certainly, blocking his airway may have contributed[.]" yet no other testimony was presented by the defense. (Trans. P. 553, ll. 20-21) In addition, questions were not asked of witnesses regarding whether they had been pressured by police to change their testimony and no objections were lodged to exhibits sitting in sight of the jury but not admitted into evidence.

The only issue raised on direct appeal was the issue of discriminatory peremptory challenges made by the State. The appeal was denied.

When Ford filed for post conviction relief, the district court determined he could not prevail on his claim of ineffective assistance of counsel for several reasons. As to the claim of Mr. Ford that trial counsel was ineffective for failure to timely object to jury selection, the district court found that he should

have raised that issue on direct appeal. (Appendix, Exhibit A, P. 6)

Regarding the remainder of the allegations by Mr. Ford, the district court determined that Mr. Ford provided no evidence to show his allegations were true or could be proven to be true. (Appendix, Exhibit A, P. 6) Mr. Ford did, through his appointed appellate attorney, provide an affidavit and facts through police reports and other records, as well as providing others in his *pro se* filing with the district court. (Appendix, Exhibit C) In addition, Mr. Ford informed the district court that he was concerned that his appointed counsel had not provided sufficient information to explain and preserve his claim. (Appendix, Exhibit C) Mr. Ford appealed to this Court, filing other factual information implicating ineffective assistance of counsel on direct appeal, and this brief followed.

## STANDARD OF REVIEW

When reviewing the denial of a petition for post conviction relief, this Court reviews the lower court findings to determine whether or not they are clearly erroneous and reviews its conclusions of law to determine if they are in error. *Kallowat v. State of Montana*, 2004 MT. 152, ¶7, ____ Mont.____.

A claim of ineffective assistance of counsel is a mixed question of law and fact and is reviewed by this Court *de novo*. *State v. Henderson* 2004 MT 173,

¶3, 322 Mont 69, 71, ¶3, ___ P.3d ___, ¶3.

## SUMMARY OF ARGUMENT

Reversible error occurred when the district court denied post conviction relief without an evidentiary hearing. *State v. Audet,* 2004 MT 224, ¶1, ____Mont. ___. When the inadequacy of counsel's efforts cannot be determined by the record alone, it is an issue that is necessarily raised by post conviction relief so that facts outside the trial record may be found. *Audet, supra.* Eugene Ford alleged that his trial counsel had been ineffective, leading to his conviction. He included specific reasons outside the record for the claim of ineffective assistance of counsel in the post conviction request.

Here the district court had, at its fingertips, a showing of ineffective assistance of counsel regarding the jury selection issue, as this Court held on direct appeal that trial counsel objected too late for this Court to review the issue of discriminatory jury selection. *Ford,* at 2001 MT 230, ¶28. Jury selection is typically considered carefully by this Court. *See, State v. LaMere,* 2000 Mont. 45, 57 St.Rep.214. The chances of the conviction being overturned existed had the claim been reviewed.

A defendant's right to counsel includes competent and effective assistance to allow a fair trial to take place. U.S.Const., 6th Amend.; Art. II, Sec. 24, Mont.

Const.; *Strickland v. Washington* (1984) 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *Henderson,* 322 Mont. at 71, ¶4.

Under the two prong *Strickland* test, Mr. Ford must show counsel's performance was deficient, and that without the deficiency, it is probable that the outcome would have been different. *Henderson,* 322 Mont. at 71, ¶4. Mr. Ford can undeniably show his counsel's performance was deficient in timely objecting to jury selection process. *Ford* at 2001 MT 230, ¶28.

The other facts which Mr. Ford alleges to be deficiencies of his trial counsel's performance are serious. For instance, he alleges that another person possibly caused the death of the decedent. There could be no "trial strategy" which would allow the attorney to ignore the possibility that the death was caused by another when the attorney is presenting self defense as an affirmative defense.

Based upon the facts known from the record, i.e., this Court's prior opinion on direct appeal, and the allegations made by Mr. Ford which are supported by the record, there is sufficient basis for this Court to reverse the trial court and order a hearing to be held in regarding the claim of ineffective assistance of counsel to determine if Mr. Ford is entitled to relief.

## ARGUMENT

### 1. Eugene Ford is entitled to an evidentiary hearing regarding the issue of ineffective assistance of counsel.

The facts which faced the district court regarding the claim of ineffective assistance of counsel are striking in their simplicity. First, Mr. Ford's trial counsel failed to object timely to what he believed was a discriminatory use of peremptory challenges by the prosecutor. The failure to object in such a way as to allow for review on appeal substantially harms the defendant, not only on appeal, but during the trial. The purpose of choosing a jury is to have a trial by one's peers who are not predisposed to a certain verdict.

The specific failures of counsel claimed by Mr. Ford in his petition for post conviction relief are: 1) failure to timely object to discriminatory use by the State of peremptory challenges to jurors; 2) failure to interview witnesses; 3) failure to make motions to suppress statements made by Mr. Ford in violation of *Miranda, supra*; 4) failure to move to suppress or limit other witness testimony; 5) failure to move to suppress evidence obtained without a search warrant; 6) failure to handle media; 7) failure to present evidence that death occurred because of negligent rescue or medical care; 8) failure to adequately cross examine a witness; and 9) failure to object to evidence admitted and/or on

display during trial without admission as evidence. He provided his affidavit, copies of police reports, ambulance reports, search warrants, medical records, photographs and drawings as the foundation of his request pursuant to *Griffin v. State* 2003 MT 267, ¶11, 317 Mont. 457, ¶11, 77 P.3d 545, ¶11.

The law regarding ineffective assistance of counsel was announced by the United States Supreme Court in the *Strickland* case in 1984. The Montana Supreme Court has followed the two prong test established in *Strickland* since that time. First, the court must look at whether it appears that the attorney's actions were deficient. Then the court must look at whether the apparent deficiency was prejudicial to the client. In looking at the "deficiency", the court looks at whether the attorney made the decision to act or omit based upon "sound trial strategy [which] falls within a wide range of reasonable professional conduct." *State v. Hendricks*, 2003 MT 223, ¶7, 317 Mont. 177, ¶7, 75 P.3d 1268, ¶7.

In this case, the first claim of Mr. Ford does not fall within "trial strategy". Failing to object timely regarding the jury selection process could only harm the defendant. The reasonable professional, i.e. criminal defense attorney, would be aware of the cases holding that such objection has to be made prior to the jury being sworn as the seminal case was decided in 1986 and

followed by numerous cases in both state and federal courts. *Batson v. Kentucky,* (1986) 476 U.S. 79, 106, S.Ct. 1712, 90 L.Ed2d 69.

As to the other claims raised by Mr. Ford in his request for post conviction relief, the interviewing of witnesses is specifically not "trial strategy", nor is the filing of motions to suppress. *Foster v. Lockhart* 9 F.3d 722 (8th Cir. 1993); *United States v. Matos* 905 F.2d 30 (2nd Cir. 1990). There can be no astute cross examination of a witness if the attorney has no knowledge of what that witness knows or opines. Further, the defense attorney cannot know what witnesses, if any, would contradict that witness, or know of any background information with which to impeach the witness without interviewing all witnesses. This leads to the defense having no time to subpoena or contact witnesses who may have something crucial to tell the jury during the defense portion of the case. It also leads to the defense failing to gather necessary information which may be used to suppress testimony or evidence prior to trial.

Lack of trial preparation is clearly "deficient" in comparison to the reasonable professional standard. That lack must then be added to the lack showing clearly on the record. Each of these "deficiencies" adds together to create a substantial showing that the trial in this matter was infected with prejudice. An evidentiary hearing is necessary to determine the extent of

"deficiencies" which occurred and how much prejudice ensued.

Failing to object to evidence which is not submitted to the court and jury, but is in plain sight, allows prejudice to occur, although not on the record. Without an evidentiary hearing, there is no way for Mr. Ford to show the prejudice to him based upon what that evidence was and where is was in relation to the jury. Failing to call a witness to testify about the layout of the apartment for the purpose of proving prosecution witnesses were not truthful as to what they saw is not trial strategy, but "deficiency". *United States v. Palomba*, 31 F.3d 1456, 1466 (9th Cir. 1994)

Mr. Ford has alleged that the witness Boland could not have seen Mr. Ford sitting at the table drinking alcohol. (Appendix, Exhibit B, P. 8) Had another witness with a schematic diagram shown at trial that Boland could not have seen what he testified to, then Boland would have been impeached, calling into question the veracity of his testimony in full. As this case involves a self defense claim, a jury which believes that a witness has "juiced up" his testimony could very well disregard the testimony in full.

The district court determined that because Mr. Ford should have raised the issue of ineffective counsel on direct appeal, he could have no relief. The State has taken the position that this case is procedurally barred because the issue was

not brought before the Montana Supreme Court on direct appeal. The district court agreed and erred in its determination.

Relying on §46-21-105(2), MCA, the State argued at the district court level that Ford should have appealed the issue of ineffective assistance of counsel on direct appeal because it is in the record. *Response to Petition for Postconviction Relief* at P. 19. In direct contradiction of that argument, the State then argued that there is nothing on the record to show Ford's trial counsel was ineffective and that Ford's affidavit of what his attorney failed to do in preparation for trial is inadequate as a basis to hold a hearing and therefore he should not be granted relief. *Response to Petition for Postconviction Relief* at P. 3-18. Obviously both cannot, and are not, true.

It is clear that in an instance where the ineffectiveness of counsel claim is on the record, then direct appeal must be taken regarding the issue. *Gollehon v. State*, (1999) 296 Mont. 6, 986 P.2d 395. In this case, however, only the failure of the trial attorney to object timely is on the record. That appeal did not encompass the issue of incompetent counsel because appellate counsel did not raise it, although requested to do so by Ford. (Appendix, Exhibit E, Exhibit A attached therein) When there is a "cause" that the defendant did not previously raise an issue earlier, it may be raised on collateral review. In this case, there

was a cause the issue was not raised, i.e., ineffective assistance of counsel on the appellate level. The failure to raise that issue on appeal has prejudiced Mr. Ford, so that he meets the standard put forth for the post conviction court to determine the issue on its merits.

In its Order, the district court found that because the record of the trial did not show Mr. Ford's claims regarding the things his counsel did not do prior to or during trial, he could not have relief. The district court's order is a "Catch 22". If the complaint is on the record, it should have been appealed, and if not on the record, then there is nothing that can be done. As has been noted before, fact finding is necessary to determine the extent of any "deficiency" and is properly done by the district court. *Audet, supra; State v. Turnsplenty*, 2003 MT 159. Particularly in this case, where only one part of the ineffective assistance of counsel can be seen on the record which could have been appealed, i.e., the failure of the attorney to timely object during jury selection, and the remainder of failures are not on the record, but require further fact finding, Mr. Ford has "cause" to have not raised the issue as he has been unable to do so.

Mr. Ford has pointed out very specifically to this Court and to the district court, that he requested issues to be raised on appeal which were not raised. (Appendix, Exhibit E, Exhibit A attached therein) It was counsel's decision not

to raise the issue of ineffective assistance of counsel in the direct appeal, which again, places Mr. Ford in a no win situation. Mr. Ford has presented both the district court and this Court with sufficient facts which show counsel performance deficits to rise to the level which do prejudice a defendant during trial for an evidentiary hearing to be ordered.

## CONCLUSION

Eugene Ford should be granted an evidentiary hearing before the district court so that the facts can be determined regarding whether the claim of ineffective assistance of counsel is sufficient to demand a new trial or other relief.

DATED this 09th day of September, 2004.

BELL & MARRA, pllc

Antonia P. Marra

Antonia P. Marra

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief on Appeal was duly served upon the following by [ ] U.S. mail; [ ] Federal Express; [X] Hand-delivery; or [ ] facsimile transmission:

Attorney Generals Office
State of Montana
215 North Sanders
Helena, MT 59604

DATED this 09th day of September, 2004.

By: Tiffany Rusk
Tiffany Rusk

## CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply Brief is in compliance with the Montana Rules of Appellate Procedure 27(d)(iv)(as amended, effective August 01, 2000). The Brief's line spacing is double. The brief is proportionately spaced, is printed in 14 Times New Roman and the non-exempt portions of the Brief do not exceed 10,000 words.

Dated this 09th day of September, 2004.

BELL & MARRA, pllc

Antonia P. Marra
Antonia P. Marra